IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.115 OF 2003

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Municipal Corporation of
Greater Mumbai ...Petitioner

v/s.

PWT Projects Ltd. ...Respondent

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Mr.U.J. Makhija with Mr.Pimpale for the Petitioner.

Mr.K.M.Jawale for Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 9TH FEBRUARY,2005

ORAL JUDGMENT:

1. The Petitioner/Municipal Corporation of the Gr.Bombay by this petition filed under Section 24 of the Arbitration & Conciliation Act, 1996 challenges the award made by the sole-arbitrator dated 10th November, 2002 directing the Petitioner to pay certain amounts with interest to the Respondent. Admitted position is that the Petitioner had entered into a contract pursuant to a global tender floated by the Petitioner in February, 1998 for supply, delivery, erection and commissioning of a 455 MLD Water Treatment Plant and construction of Associate Civil Works at Panjrapur. That contract had an arbitration clause. The arbitration clause provided for appointment of single arbitrator by consent of parties or appointment of three arbitrators, one by the Corporation and other by the Respondent and third arbitrator by the President of the International Chamber of Commerce. But in the present case a single arbitrator was appointed by consent of the

parties. The arbitration clause also provided that the arbitration shall be conducted in accordance with Rules and Procedure for Arbitration of the International Chamber of Commerce (herein after referred to as "ICC"). After the Arbitrator was appointed, the first meeting was held on 24th March, 1999. In that meeting the advocate appearing for the Respondent pointed out that according to arbitration clause the arbitration proceedings are to be conducted in accordance with the ICC Rules of Arbitration. It is stated in the minutes of the meeting dated 24th March, 1999 that the advocate appearing for the Corporation sought time to consider the situation. The Respondent addressed a letter dated 13th April, 1999 to the International Chamber of Commerce informing them that as per the contract between the parties by consent of parties the sole arbitrator has been appointed to decide the dispute between the parties. The second sitting with the arbitrator was held on 30th July, 1999. In the minutes of the proceedings the arbitrator has noted that on behalf of the Respondent it was stated before the arbitrator that they have written letter dated 13th April, 1999 to the International Chamber of Commerce, but no reply is yet received. On behalf of

the claimant, it was also stated that they would expedite the process of getting the concurrence of the ICC for appointment of the sole arbitrator. In the meantime, it appears that on 19-1-2000 the arbitrator addressed a letter to the Petitioner/corporation, where he quoted his fees for carrying out the arbitration proceedings. In that letter he stated that if the arbitration is to be carried out under the ICC Rules what would be the fees to be charged by the arbitrator. By letter dated 21st February, 2000, the arbitrator clarified what fees he will charge for carrying out arbitration according to ICC Rules. In the letter dated 13th March, 2000 written to the Corporation by the arbitrator, the arbitrator stated thus in paragraph (3.1)

> 3.1 The Arbitration Agreement under the Clause 67 of the Contract was the subject of much debate between the Learned Counsel of both parties at the hearing of the Preliminary Objections held on 11th-12th February, 2000. On hearing both sides, I came to the conclusion that the Arbitration could be conducted in accordance with the

> Rules and procedures for Arbitration of the ICC without it being done under the umbrella of the ICC, but to the extent that the Rules are not in conflict with the substantive laws of the land such as the Indian Arbitration Act, 1966, the Indian Contract Act 1872, the Limitation Act 1963, etc., as found applicable as the arbitration proceeding.

In paragraph (4.1) the sole arbitrator referred to the contingency of his appointment being confirmed by the ICC. Para 4.1 reads as under:-

> 4.1 I am fully aware of the ICC Rules governing the Arbitrator's Fees as given in Appendix III of the ICC Rules but I would like to point out that I am not under the jurisdiction of the ICC as yet. Unless my appointment as Sole Arbitrator is recognised and confirmed. In other words, I have no 'locus standi' with the ICC at present and cannot approach them for fixing my Fees and Expenses.

2. It may be pointed out here that the Respondent/claimant had written a letter dated 9-8-1999 to the International Chamber of Commerce seeking confirmation of the appointment of the sole-arbitrator. It appears that on 6th July, 2000, the Petitioner/Corporation addressed a letter to the International Chamber of Commerce pointing out therein that the Respondent has represented before the sole-arbitrator that they have written letters dated 13th April, 1999 and 9th August, 1999 to the ICC requesting them to confirm the appointment of the sole-arbitrator. The request was made on behalf of the Corporation to confirm whether such an application was made by the Respondent. It was further stated "You are also requested to verify whether the claimants in the above case have complied with the mandatory requirements of the ICC Rules before seeking any confirmation of appointment of the arbitrator and for further proceedings". It may be pointed out here that in their letter dated 9-8-1999 the Respondent stated thus:

During a meeting held on 30th July, 1999,

> both the sole-arbitrator and MCGM requested that ICC confirm the appointment of Mr Eric Saldhana of 91 Buena Vista Apartments, General Bhonsle Marg, Mumbai 400 021, India. As the sole arbitrator to settle the claims between PWT Projects and MCGM. A copy of the notes taken at the meeting is enclosed.
>
> So as to get this matter resolved, could you please confirm Mr Eric Saldhana as the sole arbitrator.

It appears that the letter dated 6th July, 2000 from the Corporation to the ICC is replied by letter dated 25th July, 2000. In the reply the ICC stated thus:

> Please be advised that although the Secretariat did receive letters dated 30 April 1999 and 9 August 1999 from PWT Projects Limited, when such letters were received, the Secretariat informed PWT Projects Limited that for an arbitration to

> take place under the ICC Rules of Arbitration and for an arbitrator to be confirmed in an ICC proceedings, it is necessary for a Request for Arbitration to be submitted to the Secretariat, accompanied by the US$2500 advance payment on administrative expenses, in accordance with Article 4 of the 1998 ICC Rules. The Secretariat never received such Request for Arbitration and its accompanying payment.

3. It was further stated in the letter that it appears from the proceedings that the sole arbitrator is conducting the proceedings as ad-hoc arbitrator. It appears that the copy of this letter was also forwarded to the Respondent. It appears that in this background, the Petitioner raised an objection to the jurisdiction of the sole arbitrator to act as an arbitrator in the absence of any confirmation to his appointment by the ICC. This objection was raised in the first statement of defence filed by the Corporation. By communication

dated 22-2-2000, the arbitrator informed both the sides that he has decided to reject the objection raised by the Corporation and that the reasons for that decision would be disclosed in his award. It appears that there was an application made by the Corporation for reconsideration/clarification of the decision contained in the letter dated 22-2-2000. The arbitrator by letter dated 15th May, 2000 clarified that the order is clear that he has rejected the preliminary objections. Thereafter, the arbitrator continued the proceedings and ultimately the arbitrator made the final award directing the Corporation to pay Rs.2,30,18,091/- with interest and Rs.5,33,023 Ponds with interest. This award contains the reasons for rejecting the preliminary objection raised on behalf of the Corporation regarding jurisdiction of the sole arbitrator to conduct the arbitration proceedings even without confirmation of his appointment by ICC.

4. In paragraph (6.0) of the award the arbitrator has noted that on behalf of the Petitioner/Corporation an objection was raised that as the claimants have not followed the procedure

laid down by the ICC Rules in the matter of appointment of the Arbitrator, the sole-arbitrator has no jurisdiction to carry on the arbitration proceedings. The learned Counsel appearing for the Petitioner urged that the arbitration clause clearly provided for following of the procedure laid down under the ICC Rules. He submits that therefore the appointment of the arbitrator had to be in conformity with the ICC Rules. He submits that the Respondent also understood the position clearly and therefore the Respondent approached the ICC for confirmation of the appointment of the sole-arbitrator, but when the ICC required them to submit necessary fees, necessary fees were not submitted and the request was not followed up. With the result, there is no confirmation of the appointment of the sole arbitrator by the ICC. Similarly, the arbitrator has also not followed the procedure of submitting the draft of the award for approval to the ICC. He submits that the same arbitrator by his letter dated 13th March, 2000 had informed the Corporation that he has come to the conclusion that the arbitration has to be conducted as per the ICC Rules and that the ICC Rules are to be deviated to the extent they are contrary to the

substantive law of India. The learned Counsel further submits that the arbitrator charged the fees payable to the arbitrator when the arbitration is conducted under the ICC Rules. The learned Counsel submits that the arbitrator has overruled the objection raised on behalf of the Corporation by holding that the Corporation had given up or waived this requirement. It is submitted that there is no question of the Corporation waiving the requirement. It was the duty of the Respondent to apply for confirmation of the appointment. Accordingly, the Respondent applied, but when no confirmation was forthcoming the Corporation raised an objection in its first reply submitted before the arbitrator. According to the learned Counsel the conclusion reached by the arbitrator that the Corporation has waived the requirement of confirmation to the appointment of arbitrator is a conclusion which is impossible to reach in the facts and circumstances of the case.

5. On behalf of the Respondent, on the other hand, it is submitted that in accordance with the draft of the contract which accompanied the tender documents, an arbitration clause was contained. That

arbitration clause contemplated conduct of the arbitral proceedings under the ICC Rules, but that procedure was changed by the Corporation itself and the phraseology of the arbitration clause was changed. With the result, the ICC Rules were now applicable to only procedural part and not in relation to the appointment of the arbitrator. The learned Counsel appearing for the Respondent took me through the ICC Rules and submits that to the arbitration in question the ICC Rules were not applicable. The learned Counsel relied on a communication from the ICC, where it is stated that the arbitral proceedings in the present case are ad-hoc arbitration and that the arbitration proceedings were not being conducted under the ICC Rules, but only procedural part of the ICC Rules was applicable. The learned Counsel also referred to the provisions of Section 12 of the Arbitration Act and submits that challenge to the appointment of the arbitrator should have been made by the Corporation at the first available opportunity and the conduct of the Corporation of participating in the arbitration proceedings does establish that they have waived their rights to raise an objection to the appointment of the arbitrator. It was also

submitted that it was , therefore, not necessary to get confirmation to the appointment of the arbitrator. However, the claimants entered into correspondence with the ICC for getting the confirmation as measure of abundant caution.

6. Now, if in the light of these rival submissions, if one looks at the award, it appears that the first reason that has been given by the arbitrator is that in the first meeting held on 24-3-1999 he followed the usual procedure and not the procedure under the ICC Rules, but still the Petitioner did not raise any objection. It is further observed that the Petitioner participated in the proceedings right from 24-3-1999 and attended three arbitral meetings held on 24-3-1999, 30-7-1999 and 19-11-1999. According to the arbitrator, the Corporation should have raised objection at least in the second meeting, but they raised their objection only in their statement of defence, and therefore, according to the learned arbitrator, the Corporation acquiesced in the proceedings before the arbitrator. According to me this reason given by the learned arbitrator shows complete non-application of mind by the learned arbitrator. The statement of defence

admittedly was filed by the Petitioner on 19-11-1999 and an objection to the jurisdiction of the arbitrator to continue the arbitral proceedings in the absence of confirmation as required by the ICC Rules was raised. Perusal of Section 16 of the Arbitration Act shows that an objection to the jurisdiction of an arbitrator is to be raised before the arbitrator itself. Sub-section (2) of Section 16 reads as under:-

> 16(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator.

7. It is clear from provisions of sub-section 2 of Section 16 that an objection to the jurisdiction has to be raised not later than the submission of the statement of defence. In the present case, admittedly an objection to the jurisdiction of the

arbitrator was raised in the first statement of defence. Therefore, the objection was raised in accordance with the provisions of the Act. It is pertinent to note here that Section 16 does not prohibit a challenge to the jurisdiction of the arbitrator being raised even at a later stage. In fact it permits an objection to the jurisdiction being raised at a later stage. Therefore, there is no question in this case of inferring any waiver by the Corporation because they raised the objection in the first statement of defence. Thus, first reason given by the learned arbitrator totally ignores the law. Secondly, admittedly an objection was raised on 19-11-1999. A decision to reject the objection was taken by the arbitrator in February, 2000. However, by his letter dated 13th March,2000 i.e. after he took the decision that the ICC Rules apply only to the procedural part. He wrote a letter dated 13th March, 2000. In paragraph 3.1 of that letter which is quoted above, in clear terms he stated that the arbitration is to be conducted in accordance with the Rules of the ICC and that the only deviation possible from those rules is to the extent of inconsistency between the provisions of the Rules and the substantive law in India. It is

to be seen here that Article 8(3) of the Rules of ICC Rules of Arbitration contemplates the parties by agreement appointing the sole arbitrator and forwarding his name for confirmation by the International Chamber of Commerce. Article 8(3) reads as under:-

> 8(3) Where the parties have agreed that the dispute shall be settled by a sole arbitrator, they may, by agreement nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the Claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

8. Thus, it is clear that the ICC Rules contemplate parties nominating the sole arbitrator and the appointment of that arbitrator being confirmed by the ICC. Article 9 makes the provisions as to how the request for confirmation of the appointment of

the sole-arbitrator is to be scrutinised by the Secretary General. Article 9(2) is relevant. It reads as under:

> 9(2)The Secretary General may confirm as co-arbitrators, sole arbitrators and chairmen of Arbitral Tribunals persons nominated by the parties or pursuant to their particular agreements, provided they have filed a statement of independence without qualification or a qualified statement of independence has not given rise to objections. such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or chairman of an Arbitral Tribunal should not be confirmed, the matter shall be submitted to the Court.

9. It is thus clear that the ICC Rules contemplate appointment of the sole arbitrator by the parties and it contemplates that parties shall move the ICC for getting the appointment of the sole arbitrator

confirmed and it also lays down the procedure for doing so. In the present case the conduct of the Respondent shows that the Respondent understood this position clearly and therefore the Respondent approached the ICC for confirmation of the appointment of the sole arbitrator. The ICC communicated to the Respondent that the request should be accompanied by payment of fees. But the Respondent abandoned that application and did not deposit the fees. It is further to be seen here that getting confirmation to the appointment of the sole arbitrator will be as per the procedure to be followed in arbitration in accordance with the terms of the contract. According to the letter of the arbitrator himself as also the finding in the award in paragraph 7.6 that the ICC Rules were applicable save and except those provisions which are in conflict with the substantive law of India. Neither the arbitrator nor the learned counsel appearing for the Respondent pointed out to me any provisions in the substantive law of India which contains the provisions contrary to the requirement of getting the appointment of arbitrator made by the parties confirmed by the third party, namely the ICC. In reality, sub-section 2 of Section 11 of the

Arbitration Act, in fact recognises the position that the parties are free to agree on procedure for appointing the arbitrator or arbitrators. Therefore, if the parties by making the ICC Rules applicable agree to the procedure that the parties will appoint the sole arbitrator and in case the parties do so, they will get the appointment confirmed by the ICC. The parties were entitled to do so under the substantive law of India, and therefore, there is no question of requirement in the agreement between the parties regarding appointment of the arbitrator being confirmed by the International Chamber of Commerce being contrary to any substantive law of India. I do not find anything in the award which will even indicate that the requirement of getting the appointment confirmed is not a procedural requirement. It is further pertinent to note here that though the learned arbitrator refers to the conduct of the Petitioner in the matter of confirmation of the appointment of the arbitrator, it totally excludes from consideration the conduct of the Respondent in that behalf. The Respondent by letters dated 24-3-1999 and 9-8-1999 made a clear request for confirmation of the appointment. Relevant portion from the

letter dated 9-8-1999 is quoted above. I do not find any explanation given in any document produced by the Respondent as to why the application made to the ICC for confirmation of the appointment of the sole arbitrator was abandoned or given up. It is pertinent to note here that before the arbitrator in the meeting held on 13th July, 1999 the Respondent stated that they will expedite the process of getting the confirmation of appointment of the arbitrator. The correspondence between the Corporation and the Arbitrator in relation to the fees to be charged by the Arbitrator shows that for the purpose of charging fees the Arbitrator was treating the arbitration to be under the ICC Rules, whereas so far confirmation of his appointment is concerned, according to the learned arbitrator that requirement under the ICC Rules is not applicable. It was contended that because it is stated in the letter dated 25th July, 2000 that in accordance with the Article 2(4) of the Appendix III of the ICC Rules, there cannot be any financial relationship between the parties and the arbitrator, the present arbitration could not have been under the ICC Rules. In my opinion, the submission is devoid of any substance. The parties have chosen the arbitrator

by their consent and merely because the fees of the arbitrator are to be paid by one of the parties, it cannot be said that there is any financial relationship between the arbitrator and the parties. If the parties with their open eyes have accepted this arrangement, in my opinion, it cannot be said that in such situation, application of the ICC Rules is totally ruled out. In any case, this question would have arisen in case the Respondent had made an application for confirmation after paying necessary fees. In my opinion, the Respondent was not at all justified in assuming that the confirmation to the appointment would not be granted by the ICC and therefore not making the application. Had the ICC refused to grant confirmation for the aforesaid reason or for any other reason, that decision was capable of being challenged and what ICC says is only its interpretation of the Rules and that cannot be accepted as final. In my opinion, the Respondent was not justified in taking unilateral decision that confirmation by ICC is not at all necessary and therefore not making an application in accordance with the ICC Rules after paying necessary fees. It is further to be seen here that according to Article 27 before signing the award the Arbitrator is

required to submit a draft of the award to the Court and the Court has to approve the award. In the present case, as the confirmation of the appointment itself was not taken, obviously the draft of the award was also not sent for approval. It is, thus, clear that the arbitrator was not at all justified in rejecting the preliminary objection to the jurisdiction of the sole arbitrator to conduct the arbitration. In my opinion, the objection raised by the Corporation was well founded and should have been upheld by the Arbitrator.

10. In the result, therefore, the present Petition succeeds and is allowed. The award of the sole arbitrator impugned in the petition is set aside. The Respondent is directed to pay costs of this petition to the Petitioner, as incurred by the Petitioner.

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